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ASSAULT AND BATTERY BY THE RECKLESS MOTORIST

Livingston Hall*

The tendency to use negligence or recklessness in the criminal law as a basis for conviction, in place of the requirement in the early law of intentional wrongdoing, has been a characteristic of the law for centuries. Perhaps the most striking feature in this development in recent times has been the efflorescence of the concept of recklessness as a basis of conviction for assault and battery, without proof of a clear-cut intent to inflict injury, where bodily injury less than death has resulted from the defendant's act or omission. The Age of Invention has come, developing devices of a deadliness formerly unknown and requiring for their safe handling a high degree of care, and a considerable number of such convictions appear in the books and on the court records.

As in the field of torts, it is the automobile which now accounts for most of these recklessness cases. It was suggested by the late Professor Tulin a dozen years ago that the concept of "assault by the reckless use of an auto-

mobile" was developed by resourceful courts as a means of securing a suitable penalty to be imposed upon the reckless driver who has caused personal injury, not resulting in death, where the penalties for the statutory offense of reckless driving were inadequate.¹ If this were true, and if although legislatures meant to impose a low penalty, courts arbitrarily expanded another crime to reach a different result, it would indeed be unfortunate judicial legislation.²

This proposition raises important questions in the development of the criminal law, and seems to warrant a careful re-examination of the automobile assault cases, and an investigation of the earlier cases dealing with recklessness as a basis for liability for assault and battery.

The results of this investigation do not wholly bear out Professor Tulin's thesis. It appears that the concept of a "reckless battery" was fully developed in the United States before the first automobile cases were decided, and

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¹ Tulin, *The Role of Penalties in Criminal Law*, (1928) 37 Yale L. J. 1048, hereafter cited as "Tulin." It is not clear whether or not this theory is adopted in the note in (1939) 16 N. Y. U. L. Q. Rev. 290 at 294, on the influence of the doctrine of criminal intent on criminal legislation affecting motor vehicles.

² Judicial legislation through spurious inter-

pretation of statutes has been condemned in the strongest terms. Landis, *A Note on "Statutory Interpretation,"* (1930) 43 Harv. L. Rev. 886. Quite as improper is the unwarranted extension of criminal liability through the development of new common law crimes. See notes in (1933) 49 L. Q. Rev. 183 and (1934) 5 Camb. L. J. 263, criticizing the decision in *Rex v. Manley*, (1933) 1 K. B. 529, which created the offence of "public mischief" to convict a woman for falsely stating to the police that she had been robbed, and causing them to waste time investigating the false charge.

that the latter had their roots in decisions going back at least 50 years. The law of battery developed during the latter half of the 19th century along common law principles, from intent to recklessness, in the same manner as the law of manslaughter (and in cases of extreme recklessness, of murder) had unfolded two centuries earlier. The coming of the automobile, and the desire of prosecutors for heavier penalties than many reckless driving statutes permit, have done no more than provide numerous modern instances of this development.

A working distinction between recklessness and intent must be made before we can proceed with the discussion. There is an extensive literature on the subject,³ but for our purposes we may regard an actor as intending those consequences of an act which (a) he desires to accomplish, or (b) he knows are substantially certain to be produced by his act.⁴ To say that a man is "presumed to intend the probable consequences of his acts" is to conceal, by the use of an irrebuttable presumption of law, the fact that he need not intend the consequences in order to be liable.

Negligence, recklessness, and the

"depraved conduct" which is sufficient for murder, differ from intent in that the actor does not *desire* to accomplish the harmful consequence in question, nor does he know that it is *substantially certain* to result. Liability is predicated upon the fact that he has created an unreasonable risk that it will result. The magnitude of the risk required, to make it unreasonable, depends upon the social utility of the act done, and upon whether a conviction is sought for battery or manslaughter, on the one hand, or for murder.⁵

Whether or not it is also necessary to prove that the defendant knew the magnitude of the risk is a question upon which the authorities are not clear.⁶ In the absence of some serious mistake of fact by the defendant, often based upon intoxication or insanity, it is usually immaterial which view as to awareness is adopted. In cases where awareness is not in issue, obviously the degree of risk involved will, as it increases, run from negligence through recklessness and the "depraved heart" to intent, without any fixed boundary. Nevertheless, the distinction has meaning, hard to phrase though it may be,

³ One of the most complete treatments of the subject is found in Cook, *Act, Intention and Motive in the Criminal Law*, (1917) 26 Yale L. J. 645 at 654-8.

⁴ This is the definition put forward in Perkins, *A Rationale of Mens Rea*, (1939) 52 Harv. L. Rev. 905 at 910-11. There is also authority that an actor further intends those consequences which he knows are substantially certain to result from his act if his act accomplishes the consequences which he desires, although it may be far from certain that the act will in fact result in these consequences. *Abrams v. United States*, 250 U. S. 616 (1919). Mr. Justice Holmes in his dissent did not maintain that such consequences were not intended, but rather that the statute under which *Abrams* was prosecuted should not be

read to extend to all intended consequences, but only to consequences which the actor desired to produce.

⁵ In Pennsylvania, a greater degree of recklessness is required for battery than for manslaughter. *Com. v. Bergen*, 134 Pa. Super. 62, 4 A. 2d 164 (1939). Ordinarily there is no difference between these two crimes in this respect. See *infra*, note pp. 144, 153.

⁶ This question is discussed in Wechsler and Michael, *A Rationale of the Law of Homicide*, (1937) 37 Col. L. Rev. 701, 1261 at 1274-76, and in a note, (1939) 27 Ky. L. J. 229. *Com. v. Pierce*, 138 Mass. 165 (1884) adopts an objective standard of care, but a subjective standard still prevails in England. *Andrews v. Director of Public Prosecutions*, [1937] A. C. 576.

and borderline cases are not as frequent as one might expect.

Relationship Between Manslaughter, Assault, and Battery.

Recklessness as a ground of criminal liability in personal injury crimes probably did not appear until the late 16th or early 17th century. As has been pointed out by Professor Sayre,⁷ there may have been absolute liability for criminal homicide before the 12th century. But such a harsh rule, if it ever existed, was relatively short-lived. About that time its place was taken by a rule of the canon law brought into the common law by Bracton—the rule that an unintended killing in the course of an unlawful act *malum in se* would constitute manslaughter.⁸ Liability under this rule is not based upon recklessness, except where, as in some modern cases, the phrase “*malum in se*” is interpreted in terms of dangerousness, and not, as was originally true, in terms of morality. The illegal intent accompanying the unlawful act from which death occurred is regarded as sufficient to justify a conviction. As the law later developed, a murder conviction was possible if the unlawful act were a felony, and liability for a battery may be imposed for an unintended injury resulting from an unlaw-

ful act, where there would have been liability for manslaughter had death ensued.⁹

The concept of recklessness as sufficient for criminal liability for manslaughter appears fully developed in *Hull's Case* in 1664.¹⁰ Hull was indicted for murder where he had thrown a piece of timber from a height of two stories, killing another workman. The house stood 30 ft. from a highway or common passage, and Hull had cried “stand clear” before throwing the timber. Two of the three judges agreed that this was only misadventure, but they put the case of a similar act done in the City of London with the house touching the street, which they said would constitute manslaughter, due to the number of people passing by, “because in common presumption his intention was to do mischief, when he casts or shoots anything which might kill among a multitude of people.”

A few years earlier there had been a somewhat similar decision in a murder case, *Rex v. Halloway*,¹¹ where Halloway had tied a boy to the tail of a horse and had beaten the boy, causing the horse to run away with him. Upon these facts, the court held that “it shall be said in law to be pre-pensed malice, he doing it to one who made no resistance.” In this case there

⁷ Sayre, *Mens Rea*, (1932) 45 Harv. L. Rev. 974.
⁸ Bracton, *De Legibus* (1268) f. 120-121; see Maitland, *Bracton and Azo*, Publications of the Selden Society (Vol. VIII, 1894) 232.

⁹ This doctrine was apparently first stated to be applicable in battery cases as early as 1873, in *Com. v. Adams*, 114 Mass. 323 (1873). It has been extensively applied in automobile cases. In Ohio, where battery is defined by Page Gen. Code (1939) §12423 and earlier statutes as “unlawfully striking or wounding another,” liability without intent to injure can be predicated only upon the commission of an unlawful act. *Fishwick v.*

State, 14 Ohio C. C. (N. S.) 368, 33 Ohio Circ. Dec. 63 (1911); *Keuhn v. State*, 37 Ohio App. 217, 174 N. E. 606 (1930). In this respect battery follows the Ohio manslaughter rule of *Johnson v. State*, 66 Ohio St. 59, 63 N. E. 607 (1902). No attempt has been made in this article completely to cover this type of criminal liability.

¹⁰ J. Kelyng 40, 84 Eng. Repr. 1072 (1664). There is a full discussion of the history of this development in homicide cases in Davis, *The Development of Negligence as a Basis for Liability in Criminal Homicide Cases*, (1938) 26 Ky. L. J. 209.

¹¹ Cro. Car. 131, 79 Eng. Repr. 715 (1628).

was certainly an intention to do some injury to the boy, but it was the great danger of death, although death was pretty clearly not intended, which caused the murder conviction. From these cases stem the modern common law rules that a killing due to gross carelessness or recklessness is manslaughter;¹² while if the evidence "shows an abandoned and malignant heart on the part of the defendant," it is common law murder, although there was no intention to kill or even to cause injury.¹³ These common law crimes based upon recklessness have their statutory counterparts in many states which have abandoned the common law definitions of manslaughter¹⁴ or murder.¹⁵

In tracing the adoption, in cases where death did not result, of these homicide tests of recklessness or wanton conduct, we must make a clear-cut distinction between *assault* and *battery*. If there has been no actual

physical injury or offensive touching, the crime is invariably referred to as an "assault." It is usually held that there can be no criminal liability unless there was an intent to inflict bodily injury or an offensive touching, and recklessness is never enough for liability.¹⁶ In some states, an intent to cause apprehension in the victim is enough for conviction, due to the influence of civil assault cases.¹⁷ This general rule has been followed in automobile cases, as in other cases, and no cases have been found in which criminal liability was imposed for a reckless assault, which did not cause either injury or offensive touching.¹⁸ (With the other possible additional requirements for a criminal assault, apprehension of the victim and present ability, we are, of course, not here concerned.)

If there has been actual physical injury or an offensive touching, courts often use the terms "assault" and "battery" interchangeably to apply to the

¹² See Riesenfeld, *Negligent Homicide*, (1936) 25 Calif. L. Rev. 1, and Robinson, *Manslaughter by Motorists*, (1938) 22 Minn. L. Rev. 755.

¹³ *Mayes v. People*, 106 Ill. 306 (1883). Less strong language is used in phrasing the test in *Com. v. McLaughlin*, 293 Pa. 218, 142 Atl. 213 (1928).

¹⁴ Manslaughter is usually defined to include a killing by a gross or culpable negligence. In Ohio, where it is limited to a "killing by an unlawful act," gross negligence is not enough. *Johnson v. State*, 66 Ohio St. 59, 63 N. E. 607 (1902). *Contra*, *Minardo v. State*, 204 Ind. 422, 183 N. E. 548 (1932), under a similar statute. Statutes are not uncommon which provide a lesser penalty for a killing by a motor vehicle through a failure to use ordinary care. See Riesenfeld, *Negligent Homicide*, (1936) 25 Calif. L. Rev. 1.

¹⁵ Usually a killing committed "by an act imminently dangerous to others, and evincing a depraved mind, regardless of human life, without a premeditated design to effect death" constitutes the lowest degree of murder. Minn. Stat. (1927) §10070 (third degree) and Wis. State. (1937) §340.03 (second degree) are typical. But by New

York Penal Law §1044, such a killing is murder in the first degree, and it has been held that the act must endanger a number of people. *People v. Ludkowitz*, 266 N. Y. 233, 194 N. E. 688 (1935).

¹⁶ *United States v. Hand*, 2 Wash. C. C. 435 (1810) is an early case which has never been questioned. See *Tulin*, (1928) 37 Yale L. J. 1048 at 1053.

¹⁷ The cases are collected in a note, *The Misuse of the Tort Definition of Assault in a Criminal Action*, (1939) 11 Rocky Mt. L. Rev. 104. The note, however, fails to distinguish between common law assault cases and cases decided under various statutory provisions, and its conclusions as to the weight of authority at the common law are open to question on this ground. See also, *State v. Desco*, ... Vt. ..., 1 A. (2d) 710 (1938). Under statutes defining an assault as "an attempt to commit a battery" it should not be possible to convict where the defendant merely intended to alarm the victim. *McKay v. State*, 44 Tex. 43 (1875).

¹⁸ Of course, if there is an actual intention to cause injury or apprehension thereof, an assault without injury may be committed as well by an automobile as in any other way. Cf. *Bryson v. State*, 20 S. W. (2d) 1047 (Tex. Cr. App. 1929).

crime,¹⁹ and the same is true in many statutes, since the punishment is usually the same.²⁰ Speaking accurately, such a crime is a "battery."

The considerations which should govern criminal liability for assault and for battery are entirely different. An assault is in the nature of an attempt to inflict a battery, and for all such incomplete crimes the specific intention to commit the crime which has been attempted is of the essence of the attempt. Until the coming of the automobile it was not necessary to punish those who merely created a risk of injury, and there has never been a common law crime of "negligence in the air." The development of criminal liability for "reckless driving" without injury, following the coming of the automobile, has been exclusively statutory.

The manslaughter analogy has no possible application to support the development of a common law assault or other crime based on recklessness, where there has been no injury. In the involuntary manslaughter cases, the serious consequence of death resulting from an act which is reckless or illegal,

but not intended to produce death, justifies a serious penalty upon retributive grounds. It has been said that this is also true under a deterrent theory of punishment.²¹ Obviously this same analogy applies to liability for battery based upon the happening of physical injury short of death due to recklessness or an unlawful act. Many cases have noted this fact, or cited manslaughter cases in support of a conviction for such a battery.²² But the principle that the harmful *result* of such conduct may justify a punishment not warranted by the *conduct without any harmful result*, does not warrant the imposition of punishment for an assault if no physical harm at all has been caused by the conduct of the defendant, and he did not intend to inflict injury.

Nevertheless, it is by analogy to cases holding that there can be no *assault without physical injury*, unless there was an intention to inflict harm or at least to cause apprehension, and upon one New Jersey case holding that recklessness with an automobile did constitute an assault and battery,²³ that Professor Tulin based his major premise:

¹⁹ In a few cases a distinction has been taken between these crimes, even where physical injury was proved. See *infra*, p. 149.

²⁰ Thus New York Penal Law §244 provides: "A person who commits an assault or an assault and battery * * * is guilty of assault in the third degree." Vernon's Texas Penal Code (1936) art. 1144 provides: "The word 'battery' is used in this Code in the same sense as 'assault and battery'." But in California, where the punishment for assault differs from that for battery, it becomes necessary to keep the terms separate, and a conviction of assault requires proof or presumption of intent, even though there has been a clear battery. *People v. Vasquez*, 85 Cal. App. 575, 259 Pac. 1005 (1927). See *infra*, p. 149.

²¹ Wechsler and Michael, *A Rationale of the Law of Homicide* (1937) 37 Col. L. Rev. 701, 1261 at 1294-98.

²² Some of the more striking cases are *Com. v. Hawkins*, 157 Mass. 551, 32 N. E. 862 (1893); *Tyner v. United States*, 2 Okla. Cr. 689, 103 Pac. 1057 (1909); *Winkler v. State*, 45 Okla. Cr. 322, 283 Pac. 591 (1929); *Luther v. State*, 177 Ind. 619, 98 N. E. 640 (1912); *State v. Sudderth*, 184 N. C. 753, 114 S. E. 828 (1922); *Brimhall v. State*, 31 Ariz. 522, 255 Pac. 165 (1927); *State v. Agnew*, 202 N. C. 755, 164 S. E. 578 (1932). There are a very few cases which deny the analogy. *State v. Thomas*, 65 N. J. L. 598, 48 Atl. 1007 (1900) contains a statement to this effect which was not overruled in *State v. Schutte*, 87 N. J. L. 15, 93 Atl. 112 (1915). See also, *Woodward v. State*, 164 Miss. 463, 144 So. 895 (1932).

²³ *State v. Schutte*, 87 N. J. L. 15, 93 Atl. 112, *aff'd* 88 N. J. L. 396, 96 Atl. 659 (1916). See *infra*, p. 147.

Before the automobile battery cases were decided, there could be "no such thing as a 'negligent' battery."²⁴

Even if one were to limit his consideration of the subject to the English law, this statement would go beyond any decided English case. In the early case of *Rex v. Gill*,²⁵ a man was indicted "for throwing down skins into a man's yard, which was a public way, *per quod* another man's eye was beat out." The evidence showed that the wind had taken the skin and blown it away, and the defendant was acquitted. From the cases cited by the court, it appears clear that there was no negligence here at all.

In the later English case of *Reg. v. Martin*,²⁶ there is a statement that recklessness was enough for a conviction under 24 and 25 Vict. c. 100, §20, punishing as a misdemeanor "Whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm on another person." The jury found that the defendant, who had put out the lights in a theatre at the close of the performance and fixed an iron bar across the doorway, as a result of which many persons had been crushed in the crowd, had done so "with the intention of causing terror and alarm" and "wilfully obstructing the means of

exit." Lord Coleridge dealt with the case as on the same footing with the "malice" needed for murder, and Stephen, J., thought that "if the prisoner did these acts recklessly he did them wilfully," and the conviction was affirmed. The counts for assault had been withdrawn from the jury, but Stephen, J., "had very great doubt whether they were not maintainable." However this may be, it is commonly stated by modern writers upon the English law that there can be no common law criminal battery without "actual intention" to commit injury,²⁷ although no other criminal cases are cited upon the question.

The crime of battery in the United States has developed much farther, drawing from the manslaughter analogy. The earliest extension was apparently by a statute in Missouri enacted in 1845 which made it a felony:²⁸

"If any person shall be maimed, wounded or disfigured, or receive great bodily harm, or his life be endangered, by the act, procurement, or culpable negligence of another, in cases and under circumstances which would constitute murder or manslaughter if death had ensued."

There do not seem to have been any American common law prosecutions for reckless battery, or cases even discuss-

²⁴ Tulin, (1928) 37 Yale L. J. 1048 at 1053. Cases holding that there can be liability for a battery where the defendant aims at one person and hits another do not add anything one way or the other, for it is well settled even in the few states which require an intent to inflict injury, that the intent need not be directed toward the person actually hit, to constitute a common law battery. *People ex rel. Starvis v. Rogers*, 170 Misc. 609, 10 N. Y. S. 2d 722 (City Ct. New Rochelle 1939). But an aggravated assault statute or indictment may require the intention to be directed against the person actually wounded. *Rex v. Holt*, 7 Car. & P. 518 (1836); *People v. Stoyan*, 280 Ill.

300, 117 N. E. 464 (1917). See note, (1938) 42 Dick. L. Rev. 86.

²⁵ 1 Strange 190, 93 Eng. Repr. 466 (1719).

²⁶ 14 Cox C. C. 633 (1881).

²⁷ Russell, *Crimes*, (9th Eng. ed., 1936) 567-77; Kenney, *Outlines of Criminal Law*, (14th Eng. ed., 1933) 160-61.

²⁸ Act of March 27, 1845, art. 2, §38, now Mo. Stat. (1932) §4016, carrying imprisonment up to 5 years. This statute was applied in *State v. Groves*, 194 Mo. 452, 92 S. W. 631 (1906), to a case of reckless shooting, and it has since been applied to reckless motorists; see *infra*, note 119.

ing the question, until 1855. In the next decade three cases were decided which forecast the various lines of development of the next half century.²⁹ It was apparently not until the pistol became a widely-owned weapon that prosecutors had made any attempt to extend the concept of battery to the manslaughter limits.³⁰ Prior studies have touched only lightly³¹ upon the reckless battery cases decided prior to the first automobile battery case of this type in 1912,³² but it seems necessary to investigate these authorities with some care if the factors which produced the automobile battery cases are to be discovered and evaluated.

Pre-Automobile Cases on Reckless Battery

(a) Supporting a Requirement of Intent to Injure.

The first case found which in any way appears to advance this doctrine is *Commonwealth v. Randall*,³³ a Massachusetts case decided in 1855. Here the defendant, a school teacher, had been convicted of assault and battery where he had, as the jury found, inflicted "improper and excessive punishment" upon one of his scholars. Of course, he had intended to inflict bodily injury or harm, but he asked the judge

to charge the jury that he could not be guilty unless he had acted "*malo animo*." The conviction was affirmed, the Massachusetts court holding the refusal of his requested charge to be correct, and saying:³⁴

"It is undoubtedly true that, in order to support an indictment for assault and battery, it is necessary to show that it was committed *ex intentione*, and that if the criminal intent is wanting, the offence is not made out. But this intent is always inferred from the unlawful act. The unreasonable and excessive use of force on the person of another being proved, the wrongful intent is a necessary and legitimate conclusion in all cases where the act was designedly committed. It then becomes an assault and battery, because purposely inflicted without justification or excuse."

At first reading, the language seems to bear upon our problem, for an act *ex intentione* is expressly required. But all that the court held was that if there was an intentional infliction of injury, it was not necessary that the defendant realize also that as a matter of law he was inflicting excessive force in order to have the requisite criminal intent for conviction. In other words, a mistake of law of this type is no defense to this crime. Bishop in 1865 cited the case in a footnote to a guarded statement that for criminal liability "it seems not to be always

²⁹ *Com. v. Randall*, 4 Gray (Mass.) 36 (1855), *infra*, this page; *State v. Sloanaker*, 1 Houst. (Del.) 62 (1853), *infra*, p. 142; *State v. Myers*, 19 Ia. 517 (1865), *infra*, p. 143.

³⁰ It will be noted that most of the cases cited in this article which imposed liability for a reckless battery prior to 1900 involved the use of pistols, which are of course much more likely to be carelessly handled and to cause injury than rifles. In 1812 the first statute against carrying a concealed weapon was passed, and by 1855 such statutes were in force in seven states. But they did not become common until after 1911.

See Warner, *The Uniform Pistol Act*, (1938) 29 Jour. Crim. L. 529.

³¹ Tulin, (1928) 37 Yale L. J. 1048 at 1060-62, discusses only the cases cited in *State v. Schutte*, 87 N. J. L. 15, 93 Atl. 112 (1915).

³² This was *Luther v. State*, 177 Ind. 619, 98 N. E. 640 (1912). There is one earlier automobile battery case, which was not based upon recklessness but upon the commission of an unlawful act resulting in injury. *Fishwick v. State*, 14 Ohio C. C. (N. S.) 368, 33 Ohio C. D. 63 (1911).

³³ 4 Gray (Mass.) 36 (1855).

³⁴ 4 Gray (Mass.) 38-9.

necessary that there should be a specific intent to commit an assault, or a battery, or any other crime which in law includes an assault."³⁵ Nor was the case cited at all when in 1893 the Massachusetts court squarely held that a battery could be predicated upon "gross carelessness and negligence, or wanton and reckless conduct."³⁶

Precisely similar to the *Randall* case in facts, language, and ground of decision, is the Indiana case of *Vanvactor v. State*.³⁷ The statement is again made that "To support a charge of an assault and battery it is necessary to show that the act complained of was *intentionally* committed." (Italics in original.) The court goes on to say that proof of excessive force will supply the needed intent. As the evidence did not prove that excessive force was used, the conviction was reversed. And as happened to the *Randall* case, this Indiana dictum about intent was in substance overruled in 1889, to the extent that it might require an intent to inflict injury which could not be implied from recklessness, by a later Indiana case, *Mercer v. Corbin*,³⁸ in which the *Vanvactor* case was not even cited.

More to the point are later New York cases. Although only dicta, they seem to have established a New York rule that there must be an intent to injure to constitute an "assault and battery" as defined by the New York

statutes in common law terms. In *People v. Sullivan*,³⁹ the defendant had choked a woman with his hands and drew a butcher knife "as if to cut her throat but did not injure her otherwise than to choke her some." He was convicted of assault in the second degree under New York Penal Code §218 punishing one who "wilfully and wrongfully assaults another by the use of a weapon or other instrument or thing likely to produce grievous bodily harm." The trial judge had charged the jury that the defendant was guilty if he made an assault with the butcher knife, although he did not intend to do bodily harm with the knife. The conviction was reversed, the court saying: "To constitute a criminal assault an intent to do bodily harm, or by violence to insult, is requisite."⁴⁰ It will be noted, however, that there was here no battery *with the deadly weapon*, and the choking warranted a conviction only of simple assault and battery.

Similar statements are contained in other cases involving assault without injury,⁴¹ and in a case involving a battery through rude conduct, in which it was held that taking a girl's arm in a friendly way, without an intent to insult her or to be rude, did not constitute a criminal battery.⁴² However weak as authority these decisions may be as to the possibility of a reckless battery, the New York legislature in 1921 evidently felt it necessary to broaden

³⁵ 2 Bishop, *Criminal Law* (3rd ed., 1865) §76.

³⁶ *Com. v. Hawkins*, 157 Mass. 551, 32 N. E. 862 (1893).

³⁷ 113 Ind. 276, 15 N. E. 341 (1887).

³⁸ 117 Ind. 450, 20 N. E. 132 (1889).

³⁹ 4 N. Y. Cr. 193 (5th Dept. 1885).

⁴⁰ 4 N. Y. Cr. 197.

⁴¹ *People v. Ryan*, 55 Hun 214, 7 N. Y. Cr. 448 (1st Dept. 1889); *People v. Terrell*, 58 Hun 602, 11 N. Y. S. 364 (5th Dept. 1890); cf. *Hays v. People*, 1 Hill 351 (1841).

⁴² *People v. Hale*, 1 N. Y. Cr. 533 (3rd Dept. 1883); cf. *Clayton v. Keeler*, 18 Misc. 488, 42 N. Y. S. 1051 (1896).

the definition of simple assault and battery in New York Penal Law §244 to include the infliction of bodily injury by the operation of a vehicle in a culpably negligent manner.⁴³

The last state to hold that there may not be a common law conviction for assault and battery based on negligence appears to be New Jersey. In *State v. Thomas*,⁴⁴ defendant was indicted for manslaughter but convicted of assault and battery. The Court of Errors and Appeals reversed the conviction, on the ground that a manslaughter indictment did not necessarily charge an assault and battery, since manslaughter could be committed without an assault and battery. After discussing *State v. O'Brien*,⁴⁵ in which a switch tender had been convicted of manslaughter where he negligently failed to perform his duty, the court in the *Thomas* case said:⁴⁶

"Certainly if death had not ensued from his negligence, but only personal injury, a charge of criminal assault and battery could not have been sustained."

There is no evidence that the court had investigated the law on the subject, and no cases were cited in support of this statement. It is significant that in the next New Jersey case involving a reckless battery, a number of decisions from other states holding that there could be such a crime were called to the court's attention, and the de-

cision in the *Thomas* case was in effect overruled, although the court was unwilling to appear to do so, and used the language of presumed intent.⁴⁷

The express provisions of the Texas statutes prevented the development of a reckless battery in that state. Vernon's Texas Penal Code (1936) art. 1138 has provided for more than 50 years:

"The use of any unlawful violence upon the person of another, *with intent to injure him*, whatever be the means or the degree of violence used, is an assault and battery." (Italics supplied.)

Of course the Texas Court of Appeals, in the first case to come before it on this question,⁴⁸ was forced to say: "To constitute an assault and battery there must be an *intent to injure*." (Italics in original.) The Texas law has always followed this case, and although the statute further provides that if bodily injury is inflicted, the burden is then placed upon the defendant to prove that there was no intent to inflict injury,⁴⁹ yet if the evidence, even in an automobile case, shows that the injury was caused by negligence and without intent to injure, the conviction must be reversed.⁵⁰ By Texas Acts of 1917, c. 207, the legislature broadened the definition of battery to coincide with the common law definition by making any driver of a motor vehicle or motorcycle who "shall wilfully or with gross

⁴³ Laws 1921, ch. 238, amending Penal Law §244. There is a recent dictum that "intent is necessary to constitute an assault" in other cases, in *People ex rel. Starvis v. Rogers*, 170 Misc. 609, 610, 10 N. Y. S. 2d 722 (City Ct. New Rochelle 1939).

⁴⁴ 65 N. J. L. 598, 48 Atl. 1007 (1900).

⁴⁵ 3 Vroom 169 (1867).

⁴⁶ 65 N. J. L. 600.

⁴⁷ *State v. Schutte*, 87 N. J. L. 15, 93 Atl. 112 (1915), *aff'd* 88 N. J. L. 396, 96 Atl. 659 (1916).

⁴⁸ *Rutherford v. State*, 13 Tex. App. 92 (1882).

⁴⁹ Vernon's Texas Penal Code (1936) art. 1139.

⁵⁰ *Coffey v. State*, 82 Tex. Cr. Rep. 481, 200 S. W. 384 (1918), involving an aggravated battery under Branch's Penal Code (1916) §1022, providing "An assault or battery becomes aggravated when committed * * * when a serious bodily injury is inflicted upon the person assaulted."

negligence collide with or cause injury to any other person" guilty of aggravated assault. As this section now reads,⁵¹ no more than ordinary negligence appears to be required.⁵²

We see, therefore, that the doctrine that an intent to inflict injury was necessary at the common law for a conviction of assault and battery in 1912, when the first automobile case of reckless battery was decided, rested on two dicta, both of which had already been overruled, and upon the New York and New Jersey cases, with a Texas statute to provide a moral support. But even in 1912 the weight of authority was clearly against this view, as the next two sections show.

(b) *Imputing an Intent to Injure from Recklessness*

We start and end our discussion of pre-automobile cases of this type with *State v. Sloanaker*.⁵³ A Delaware nisi prius case decided in 1858, it appears to be the first case recognizing that there might be such a thing as a reckless battery. The evidence showed that the defendant had fired a pistol while on the platform of a railway car, and had hit another passenger, one Brown. The defendant testified that the pistol had been accidentally discharged, but the state claimed that he had recklessly discharged it into the crowd of people on the train, and tried him for assault and battery with intent to kill Brown.

The trial court charged the jury that defendant was not guilty of any crime

if the pistol was discharged "unintentionally and by accident merely, however imprudent, or improper, it may have been," but that if the jury "were satisfied by the proof that he discharged it intentionally and wantonly or recklessly into the crowd of persons assembled about the place at the time, or in the direction of the carriage of the prosecuting witness, indifferent as to whom he might shoot, or what the mischief or injury might be, or where or on whom it might fall, such conduct would manifest a wicked and depraved inclination and disposition on his part, that it might well be presumed by them that he intended at the time to shoot some one, upon the principle that every one is presumed to intend the natural and probable consequence of his own act," and that he might be convicted of simple assault and battery upon such evidence. As to the assault with intent to kill Brown, the court charged that this intent could not be made out by any such "inference or presumption." The defendant was acquitted by the jury, and drops out of the picture.

However, this presumption of an intent to injure from the intentional doing of a reckless act was to reappear in later automobile cases, chiefly in states which had earlier dicta requiring an intent to inflict injury for battery. This device made it easy to bring the law of those states into line with the weight of authority, without purporting to overrule the earlier cases. The language used here is identical with

⁵¹ Vernon's Texas Penal Code (1936) Arts. 1149 (as amended in 1939), 1230 et seq. See *infra*, p. 152, for the present text of the statute.

⁵² *Young v. State*, 120 Tex. Cr. Rep. 39, 47 S. W. 2d 320 (1932).

⁵³ 1 Houst. (Del.) 62 (1858).

that used in *Hull's Case*,⁵⁴ the early negligent manslaughter case, to perform the same function of making the transition from intent to negligence.

(c) *Basing a Battery Conviction on Recklessness.*

The fore-runner to this important group of cases is *State v. Myers*,⁵⁵ decided in Iowa in 1865. The case itself is not adequately reported, but it appears that the defendant was indicted and convicted for "assault with intent to inflict bodily injury" under Iowa Code (1851) §2594. The conviction was affirmed, the court approving an instruction summarized in the opinion as follows: "Recklessly shooting into a crowd, and wounding some one not intended, is criminal." One may suppose that there was in fact an intent to injure someone, although not the person actually wounded, but be that as it may, the language above quoted was of considerable importance in the development of the law of battery. The case was cited in 1874 by Wharton, for the proposition, new to that text, that "Recklessly shooting into a crowd is an assault."⁵⁶ From here it passed into general currency, and was cited for this proposition in a number of later cases.

Four years later the Georgia court held in *Collier v. State*⁵⁷ that one who shot a pistol at another, "intending, at the time, to shoot at him, not caring whether he hit him or not," was guilty

of an assault with intent to murder where the pistol ball hit the victim in the thigh, even though, as the court admitted, the defendant may not affirmatively have intended to kill or even to wound. A number of years later, in 1893, the same court stated that "there are wanton or reckless states of mind which are sometimes the equivalent of a specific intention to kill" in *Gallery v. State*,⁵⁸ and although the earlier case was not cited, its influence must have been felt to some extent.

The Georgia court later reversed a conviction for the statutory offence of "shooting at another with a gun" under Georgia Penal Code §115 in *Wolfe v. State*,⁵⁹ but there is a clear intimation in the case that "criminal negligence will supply the place of intent" for that crime, which is of course closely analogous to a common law battery.

There is also the early Pennsylvania case of *Smith v. Commonwealth*,⁶⁰ in which a conviction for assault and battery and for the aggravated assault of "unlawfully and maliciously inflicting upon another person, either with or without any weapon or instrument, any grievous bodily harm" was affirmed, in the face of a finding of the jury by special verdict that the defendant had discharged his pistol and wounded someone in a train "with the intent to shoot into the floor, and not with the intent to injure the prosecutor or any other person." The Supreme Court held that

⁵⁴ J. Kelyng 40, 84 Eng. Repr. 1072 (1664). See *supra*, p. 135.

⁵⁵ 19 Iowa 517 (1865).

⁵⁶ 2 Wharton, *Criminal Law* (7th Ed., 1874) 213.

⁵⁷ *Collier v. State*, 39 Ga. 31 (1869). This astonishing decision was finally overruled in *Wright v. State*, 163 Ga. 690, 148 S. E. 731 (1929).

⁵⁸ 92 Ga. 463, 17 S. E. 863 (1893). See the discussion of the later Georgia aggravated assault cases, *infra*, p. 155.

⁵⁹ 121 Ga. 587, 49 S. E. 688 (1905).

⁶⁰ 100 Pa. 324 (1882), *aff'd sub nom.* *Com. v. Lister*, 15 Phila. 405 (1882).

the act was "recklessly and wilfully done" and that from this "the law will imply malice." *Reg. v. Martin*⁶¹ was the only case cited by the court on the point, and the court declined to apply the cases cited by the defendant holding that an intent to injure was necessary for an *assault without injury*.

The essential similarity between battery and manslaughter was the basis of the famous Massachusetts decision in *Commonwealth v. Hawkins*,⁶² in which a conviction for assault and battery with a dangerous weapon was affirmed where the defendant had fired a pistol "in a grossly careless and negligent manner, or in a wanton and careless manner, and by so doing wounded Mary A. Powers." The court said:⁶³

"In the case at bar, if Mary A. Powers had died from the pistol shot, the defendant, on the facts found by the jury, would have been guilty of manslaughter. As she survived the injury, the same principle now requires a conviction of assault and battery. There has been much discussion in the cases in regard to the nature of the intent necessary to constitute this crime, but the better opinion is that nothing more is required than an intentional doing of an act which, by reason of its wanton or grossly negligent character, exposes another to personal injury, and causes such an injury."

The reckless and wilful discharge of a revolver at the ground while chasing a boy, without intent to do bodily injury, was held sufficient in *State v. Surry*,⁶⁴ a Washington case, to sustain a conviction for simple assault and battery where the bullet glanced from the

sidewalk and hit the fugitive. But the court approved an acquittal of the aggravated crime of "assault with a deadly weapon with intent to do bodily injury." The court cited and relied on *State v. Myers*⁶⁵ as far as simple assault and battery was concerned.

The doctrine that gross carelessness "implying an indifference to consequences" in handling a gun is enough for battery was expressly adopted by the Supreme Court of Alabama in *Medley v. State*,⁶⁶ even though the defendant had not intentionally discharged his rifle "at a place where it was likely some person would be hit." The Court of Appeals in the later case of *McGee v. State*,⁶⁷ interpreting the earlier decision in the light of the record which was available to it, said that what was required was "that the defendant designedly did an act calculated to produce bodily harm to another," and was unwilling to apply it to a case where the defendant's shotgun had been *accidentally* discharged, but even this constituted a recognition that no *intent to injure* was needed for a battery. The Court of Appeals was thus going back to the presumed intent doctrine of the *Sloanaker* case.⁶⁸

The last of the decisions on this question before 1912 is *Tyner v. United States*.⁶⁹ The defendant was convicted in the Indian Territory for assault with intent to kill, where he had fired his pistol "recklessly or heedlessly * * * or while running his horse at

⁶¹ 14 Cox C. C. 633 (1881), *supra*, p. 138.

⁶² 157 Mass. 551, 32 N. E. 862 (1893).

⁶³ 157 Mass. 553.

⁶⁴ 23 Wash. 655, 63 Pac. 557 (1900).

⁶⁵ 19 Iowa 517 (1865), *supra*, p. 143.

⁶⁶ 156 Ala. 78, 47 So. 218 (1908).

⁶⁷ 4 Ala. App. 54, 58 So. 1008 (1912).

⁶⁸ 1 Houst. (Del.) 62 (1858), *supra*, p. 142.

⁶⁹ 2 Okla. Cr. 689, 103 Pac. 1057 (1909).

an unusual rate of speed along the street" (the latter was a statutory misdemeanor), striking a boy walking nearby. The court affirmed the conviction upon the ground that if death had resulted, the defendant would have been guilty of manslaughter.⁷⁰ The decision was undoubtedly correct as to simple assault and battery, but is opposed to the weight of authority as far as the proof of the intent to kill is concerned.⁷¹

It was against the background of all these criminal cases that the first automobile battery case based upon recklessness was decided in Indiana in 1912.⁷² But the large number of decisions recognizing liability for recklessness long before the automobile became a problem is not yet wholly complete. For another source may also be drawn upon—civil actions of trespass for assault and battery provided an analogy which was not without its effect upon the courts. Although there may at one time have been absolute civil liability for a trespass to the person, without intention or negligence, if the injury was direct,⁷³ yet as early as 1616 the defence of inevitable accident was accepted, if "the defendant had committed no negligence to give occasion to the hurt."⁷⁴ The negligence required to establish liability was fixed in some jurisdictions as "the want of

exercise of due care" as early as 1850.⁷⁵ But in other states the same test for a civil trespass as for a criminal prosecution was accepted where the declaration alleged an assault and battery, and a recovery under such a declaration was denied where negligence alone was proved.

Typical of these latter jurisdictions was Indiana, and the Supreme Court of that state, as early as 1889 in *Mercer v. Corbin*,⁷⁶ held that a civil assault and battery could be predicated upon injury arising out of "recklessness and wanton disregard of human life and safety" from which "malice and criminal intent" might be inferred, although there was "no actual or specific intent" to commit an assault and battery. Civil and criminal cases were cited indiscriminately, the criminal cases including *Commonwealth v. Lister*⁷⁷ and *State v. Myers*,⁷⁸ and the manslaughter case of *Flinn v. State*.⁷⁹ A verdict for plaintiff was affirmed upon the ground that the defendant had ridden his bicycle down the footpath in violation of a statute and in "wrongful and reckless disregard of the rights of others."

Reckless Battery by Automobile

We are at last in a position to judge whether or not the Indiana court by its decision in *Luther v. State*⁸⁰ was creating a legal innovation in 1912 when

⁷⁰ The court also stated that the same facts would make out an assault "with a deadly weapon with intent to inflict on the person of another a bodily injury" under Ind. Terr. Stat. (1899) §909. See *infra*, p. 153.

⁷¹ See the Illinois cases discussed *infra*, p. 152. *Contra*, *Gallery v. State*, 92 Ga. 463, 17 S. E. 863 (1893); *State v. Taylor*, 70 Vt. 1, 39 Atl. 447 (1896).

⁷² *Luther v. State*, 177 Ind. 619, 98 N. E. 640 (1912).

⁷³ *Anonymous*, Y. B. Edw. IV, 7 Pl. 18 (1466).

⁷⁴ *Weaver v. Ward*, Hob. 134 (1616).

⁷⁵ *Brown v. Kendall*, 6 Cush. (Mass.) 292 (1850).

⁷⁶ 117 Ind. 450, 20 N. E. 132 (1889).

⁷⁷ 15 Phila. 405 (1882), *supra*, p. 134.

⁷⁸ 19 Iowa 517 (1865), *supra*, p. 143.

⁷⁹ 24 Ind. 286 (1865).

⁸⁰ 177 Ind. 619, 98 N. E. 640 (1912).

it predicated liability for a criminal battery on the reckless use of an automobile. Did it do so in order to make possible the imposition of a maximum penalty of \$1,000 fine and 6 months in the county jail for assault and battery,⁸¹ when the maximum for the first offense of reckless driving was a fine of \$50?⁸² Or was the court simply following out the common law development which had already taken place in Alabama, Delaware, Georgia, Iowa, Massachusetts, Oklahoma, Pennsylvania, Washington, and (in a civil case) in Indiana itself, following the manslaughter analogy?

The question for decision was whether the evidence sustained a conviction for assault and battery under Burns Ind. Stat. (1908) §2242, providing "Whoever, in a rude, insolent or angry manner, unlawfully touches another, is guilty of assault and battery." Defendant's automobile, while passing a street car on the left hand side, had hit a bicyclist who was riding between him and the street car and who had suddenly turned out in front of him. The court reversed the conviction upon the ground that there was no evidence of "a reckless disregard for the safety of others indicating a willingness to inflict injury" from which the jury might properly draw "the inference that appellant intended to injure" the bicyclist, but said in the course of its opinion:⁸³

"The evidence in this case establishes the collision, and the hurt of Wiesehan by the force of it, and is therefore a rude

touching of another. Intent on the part of the person charged, to apply the force constituting the battery, is, however, an essential element of the offense and must be shown to make the touching criminally unlawful. 2 Greenleaf, Evidence (16th ed.) §83; 5 Am. and Eng. Ency. Law and Pr. 680; Underhill, Crim. Ev. (2d ed.) §354; *Vanvactor v. State* (1888), 113 Ind. 276, 280, 15 N. E. 341, 3 Am. St. 645; *Perkins v. Stein & Co.* (1893), 94 Ky. 433, 22 S. W. 649, 20 L. R. A. 861.

"But the intent may be inferred from circumstances which legitimately permit it. Intent to injure may not be implied from a lack of ordinary care. It may be from intentional acts, where the injury was the direct result of them, done under circumstances showing a reckless disregard for the safety of others, and a willingness to inflict the injury or the commission of an unlawful act which leads directly and naturally to the injury. Underhill, Crim. Ev., supra; note to *Johnson v. State*, 66 Ohio St., 59, 63 N. E. 607; *Banks v. Braman* (1905), 188 Mass. 367, 74 N. E. 594; *State v. Campbell*, 82 Conn. 671, 74 Atl. 927; *Mercer v. Corbin* (1889), 117 Ind. 450, 20 N. E. 132, 3 L. R. A. 221, 10 Am. St. 76; *Reynolds v. Pierson* (1902), 29 Ind. App. 273, 64 N. E. 484; *Palmer v. Chicago, etc. R. Co.* (1887), 112 Ind. 250, 14 N. E. 70; *Parker v. Pennsylvania Co.* (1893), 134 Ind. 673, 34 N. E. 504, 23 L. R. A. 552; *Fisher v. Louisville, etc. R. Co.* (1897), 146 Ind. 558, 45 N. E. 689."

The following of the manslaughter analogy is clearly shown by the citation of *State v. Campbell*,⁸⁴ a case of automobile manslaughter through gross negligence (although charged in the indictment both as an assault causing death and as a killing by gross negligence). The court was also relying on *Mercer v. Corbin*,⁸⁵ which, although a civil case, had cited several of the ear-

⁸¹ Burns Ind. Stat. (1908) §2242.

⁸² Burns Ind. Stat. (1908) §§10465, 10476.

⁸³ 177 Ind. 625-26.

⁸⁴ 82 Conn. 671, 74 Atl. 927 (1909).

⁸⁵ 117 Ind. 450, 20 N. E. 132 (1889), *supra*, p. 145.

lier criminal reckless battery cases. It is hard to see how any other decision could have been more in accord with the precedents, although, perhaps due to the peculiar wording of the Indiana battery statute requiring a "rude" touching, it was necessary to couch the decision in terms of implied intent to injure, as was done in the *Sloanaker* case,⁸⁶ and for that matter, in *Hull's Case*.⁸⁷

Professor Tulin has criticized the New Jersey court which decided the 1916 case of *State v. Schutte*⁸⁸ for citing earlier non-automobile cases holding that there could be a reckless assault and battery. The court decided that intentionally driving a car "under circumstances that rendered likely the infliction of such an injury as that which actually resulted from it" was equivalent to the "intention to inflict injury" which is of the essence of criminal assault. Professor Tulin says: "It is thus seen that not a single one of the authorities cited has any resemblance to the problem of determining whether the penalty fixed by the legislature for reckless driving should be increased by holding the defendant guilty of assault and battery."⁸⁹

But it is submitted that neither the New Jersey court in this case, nor the Indiana court in the *Luther* case, was determining, or should have determined, any such problem. The proper penalty for a criminal act is a matter for the legislature under modern penal codes. The only question properly before either court was whether or not

the defendant's acts constituted a battery. The circumlocution and the talk of "imputed intent" was due to the court's natural (but not necessarily laudable) desire to avoid the appearance of overruling earlier dicta in each state. Both courts recognized that American decisions in the previous half century had broadened the concept of battery, although indeed there appear to have been *no decisions prior to 1850 denying liability for recklessness*.

Undoubtedly it is no mere coincidence that the automobile cases occur in states in which the penalty for assault and battery is greater than that for reckless driving. But this is not because this factor has or should have influenced the courts. A court can only decide the cases which are argued before it. Obviously, in a state in which the penalty for assault and battery is no greater than for reckless driving, there is no point in prosecuting a defendant for assault and battery, and *no prosecuting attorney will bring such a case in one of these states*. The only inference to be drawn from Professor Tulin's imposing table of statutory penalties for reckless driving and simple assault and battery concerns the exercise of "The District Attorney's Option," and considerations of relative penalties cannot be said to have moved the courts in any of these battery cases.

Attempts to state the type of reckless conduct which is sufficient for a criminal battery, and the terms in which the issue should be left to the jury, have led to some confusion in automobile

⁸⁶ 1 Houst. (Del.) 62 (1858), *supra*, p. 142.

⁸⁷ J. Kelyng 40, 84 Eng. Repr. 1072 (1664), *supra*, p. 135.

⁸⁸ 87 N. J. L. 15, 93 Atl. 112 (1915), *aff'd* 88 N. J. L. 396, 96 Atl. 659 (1916).

⁸⁹ Tulin, (1928) 37 Yale L. J. 1048 at 1063.

cases. On the whole, however, these cases hang together more consistently than do the cases of recklessness in other fields, for there are not many different types of reckless conduct possible in connection with the use of automobiles.

There is no substantial difference in the conduct required for liability in states which use the language of "imputed intent," and in other states which avoid this fiction. The intent is "imputed by law" from reckless conduct and the jury is not required to infer the existence of an actual intent to do injury.⁹⁰

The most usual definition of the conduct and state of mind required for lia-

⁹⁰ *Brimhall v. State*, 31 Ariz. 522, 255 Pac. 165 (1927); *Com. v. Kalb*, 129 Pa. Super. 241, 195 Atl. 428 (1938); *Radley v. State*, 197 Ind. 200, 150 N. E. 97 (1926); *Woodward v. State*, 164 Miss. 468, 144 So. 895 (1932); *People v. Hopper*, 69 Colo. 124, 169 Pac. 152 (1917). In *People v. Vasquez*, 85 Cal. App. 575, 259 Pac. 1005 (1927) the court holds the defendant to have "intended the natural and probable consequence of his unlawful and reckless act." In the early Indiana cases, a "willingness to injure" would be imputed from reckless conduct. See quotation from *Luther v. State*, *supra*, p. 146.

⁹¹ This definition, with some slight modifications in phraseology, is adopted in *Brimhall v. State*, 31 Ariz. 522, 255 Pac. 165 (1927); *People v. Hopper*, 69 Colo. 124, 169 Pac. 152 (1917); *Maloney v. State*, 57 Ga. App. 265, 195 S. E. 209 (1938); *Radley v. State*, 197 Ind. 200, 150 N. E. 97 (1926); *Woodward v. State*, 164 Miss. 468, 144 So. 895 (1932); *State v. Agnew*, 202 N. C. 755, 164 S. E. 578 (1932); *Com. v. Kalb*, 129 Pa. Super. 241, 195 Atl. 428 (1938); *Davis v. Com.*, 150 Va. 611, 143 S. E. 641 (1928). A similar result has been reached under the Missouri and New York statutes requiring "culpable negligence." *State v. Sawyers*, 336 Mo. 644, 80 S. W. 2d 164 (1935) overruling *State v. Miller*, 234 S. W. 813 (Mo. Sup. 1921); *People v. Waxman*, 232 App. Div. 90, 249 N. Y. S. 180 (1st Dept. 1931).

⁹² *State v. Hamburg*, 4 W. W. Har. (34 Del.) 62, 143 Atl. 47 (1928), a nisi prius case; *Com. v. Temple*, 239 Ky. 188, 39 S. W. 2d 228 (1931).

⁹³ *Pierce v. Com.*, 214 Ky. 454, 283 S. W. 418 (1926); cf. *State v. Richardson*, 179 Iowa 770, 162 N. W. 28 (1917).

⁹⁴ *State v. Lancaster*, 208 N. C. 349, 180 S. E. 577 (1935). Under the earlier Pennsylvania

bility is this: "The defendant's acts must be so (wanton) or (reckless) as to show a (reckless) or (utter) disregard for the safety of others."⁹¹ It is rarely safe for a trial court to leave the question to the jury in less comprehensive terms. In a few states "recklessness" accompanied by gross negligence⁹² or by an unlawful act⁹³ is all that is required, but "recklessness or carelessness" alone is not sufficient.⁹⁴ It is well settled that negligence of a character barely sufficient to support civil liability is not enough in any state,⁹⁵ unless a statute specifically provides otherwise.⁹⁶

The fact that the battery results from an unlawful act is also of importance. If the unlawful act is *malum in se*,⁹⁷ or

decisions, "wantonness or recklessness" was enough. *Com. v. Gayton*, 69 Pa. Super. 513 (1918). Now a "reckless disregard of safety" must be proved. *Com. v. Kalb*, 129 Pa. Super. 241, 195 Atl. 428 (1938). Of course, in any jurisdiction, if the defendant is not even guilty of "reckless driving," he should not be convicted of assault and battery. *State v. Rawlings*, 191 N. C. 265, 131 S. E. 632 (1929).

⁹⁵ Ordinarily the language used by the trial court is vastly different from that applicable to the torts cases. If the trial judge has used torts language in his charge, or if the evidence does not sustain a finding of more than ordinary negligence, the conviction should be reversed. *People v. Anderson*, 310 Ill. 389, 141 N. E. 727 (1923); *Radley v. State*, 197 Ind. 200, 150 N. E. 97 (1926); *Woodward v. State*, 164 Miss. 468, 144 So. 895 (1932); *State v. Albertalli*, 112 Atl. 724 (N. J., 1915); *State v. Lancaster*, 208 N. C. 349, 180 S. E. 577 (1935). There is a statement by a dissenting judge in *State v. Sussewell*, 149 S. C. 128, 146 S. E. 697 (1929) to the effect that simple negligence would be enough for a conviction of assault and battery, but the majority does not discuss the point, as the case involved an aggravated assault.

⁹⁶ The Texas statute originally required "gross negligence" but no more than ordinary negligence appears to be now required. See *supra*, p. 142.

⁹⁷ *King v. State*, 157 Tenn. 635, 11 S. W. 2d 904 (1928). In the states which make this distinction, an unlawful act merely *malum prohibitum* is of course not enough. *State v. Rawlings*, 191 N. C. 265, 131 S. E. 632 (1929). The nature of this distinction is far from clear, and it has come in for a great deal of criticism. See note, (1930) 30 Col. L. Rev. 74. But so long as it is administered in

a proximate cause of the battery,⁹⁸ or accompanied by negligence,⁹⁹ it has been held in a few states to be a sufficient basis for liability, and in Ohio any unlawful act resulting in injury is enough.¹⁰⁰ In any event, the commission of an unlawful act is usually regarded as some evidence of negligence, to be considered with all the other circumstances by the jury in determining whether or not the requisite degree of recklessness is found.¹⁰¹

Whether or not the defendant was actually aware of the risk which his reckless conduct was creating is rarely an issue in these cases. Most sober men will not drive in a reckless manner without being conscious of the risk they are creating.¹⁰² What few intimations there are seem to say that it is not necessary for the defendant to have known of the dangerous tendency of his acts, if he "ought to have known"¹⁰³

or if a "reasonably careful person doing the same act would have been guilty of a conscious disregard of life."¹⁰⁴ It seems clear that intoxication does not excuse but rather aggravates the type of recklessness required for liability.¹⁰⁵

One troublesome procedural problem remains. If the defendant has been indicted for some kind of aggravated assault, and the indictment does not include an express charge of battery, the jury may bring in a verdict of "guilty of simple assault." A few courts hold that the aggravated assault charge does not include a battery and that the verdict must be supported as a verdict for an assault or not at all.¹⁰⁶ Under these circumstances, a conviction for assault has been affirmed where the undisputed evidence showed that physical injury had resulted, and the intent required for the assault has been imputed from recklessness, as in the case of a

terms of dangerousness of the act, which seems to be the modern tendency, it may serve a useful purpose.

⁹⁸ *State v. Agnew*, 202 N. C. 755, 164 S. E. 578 (1932).

⁹⁹ *People v. Saroff*, 227 App. Div. 114, 237 N. Y. S. 73 (2d Dept. 1929), under a statute requiring "culpable negligence." In some states there must also be proof of recklessness, and the commission of the unlawful act does not seem to add much to the case. *Brimhall v. State*, 31 Ariz. 522, 255 Pac. 165 (1927); *Davis v. Com.*, 150 Va. 611, 143 S. E. 641 (1928).

¹⁰⁰ *Keuhn v. State*, 37 Ohio App. 217, 174 N. E. 606 (1930); *Fishwick v. State*, 14 Ohio C. C. (N. S.) 368, 33 Ohio C. D. 63 (1911).

¹⁰¹ *Singer v. State*, 194 Ind. 397, 142 N. E. 864 (1924); *State v. Schutte*, 88 N. J. L. 396, 96 Atl. 659 (1916); *Com. v. Gayton*, 69 Pa. Super. 513 (1918).

¹⁰² In *Woodward v. State*, 164 Miss. 468, 144 So. 895 (1932) the defendant had carelessly started his automobile and ran into a woman standing just in front of him. He claimed that he did not see her standing there and the trial court charged the jury that he was guilty if he could have seen her "by reasonable diligence." The conviction was affirmed, but the upper court did not pass on the correctness of this instruction, since the evidence clearly indicated that he had in fact seen

her. In *Tift v. State*, 17 Ga. App. 663, 88 S. E. 41 (1916), the defendant was convicted where he had suffered an attack of vertigo while driving his automobile, but the jury found, under the court's charge, that he knew he was subject to frequent attacks of this character.

¹⁰³ *Radley v. State*, 197 Ind. 200, 150 N. E. 97 (1926).

¹⁰⁴ *State v. Sawyers*, 336 Mo. 644, 80 S. W. 2d 164 (1935), under a statute requiring "culpable negligence."

¹⁰⁵ *Brimhall v. State*, 31 Ariz. 522, 255 Pac. 165 (1927); *Mundy v. State*, 59 Ga. App. 509, 1 S. E. 2d 605 (1939); *Chambliss v. State*, 37 Ga. App. 124, 139 S. E. 80 (1927); *Com. v. Gayton*, 69 Pa. Super. 513 (1918); *Davis v. Com.* 150 Va. 611, 143 S. E. 641 (1928). If driving while intoxicated is regarded as a crime *malum in se*, a conviction may be warranted on this, without proof of recklessness. *King v. State*, 157 Tenn. 635, 11 S. W. 2d 904 (1928). Prior to the automobile cases it had also been held that intoxication was no defense to simple assault and battery. *Whitten v. State*, 115 Ala. 72, 22 So. 483 (1896).

¹⁰⁶ *People v. Hopper*, 69 Colo. 124, 169 Pac. 152 (1917); *People v. Vasquez*, 85 Cal. App. 575, 259 Pac. 1005 (1927) (by implication). *Contra*: *State v. Suderth*, 184 N. C. 753, 114 S. E. 828 (1922); *Maloney v. State*, 57 Ga. App. 265, 195 S. E. 209 (1938) (by implication).

battery.¹⁰⁷ The same result has been reached where the defendant was indicted for "assault and battery" and the jury has convicted him of "simple assault" only, although the undisputed evidence showed the commission of a battery.¹⁰⁸ These decisions represent an extreme instance of the policy of the law of upholding convictions for a lesser crime than that proved by the evidence where the defendant has, through the technicalities of pleading or by a compromise verdict, been let off more lightly than he deserved.¹⁰⁹

Aggravated Assault by Automobile

As their name implies, the aggravated assault cases usually arise under statutes phrased in terms of "assault" plus various accompanying circumstances which justify the increased penalty.¹¹⁰ Yet in every one of the automobile cases there has been actual physical injury, amounting to an admitted battery. Should the court permit the battery to take the place of the required assault, if there has been no actual intent to injure or alarm, as is required for an assault without physical injury? In two cases the court felt that all the requirements of a technical "assault" had to be met, but in one of

them the intent was "imputed" from recklessness,¹¹¹ and in the other, in which recklessness did not clearly appear, the existence of an assault was doubted.¹¹² In the remaining automobile cases in which a conviction for aggravated assault has been upheld, the court has not discussed the matter. There should be no question about liability, for the main considerations of policy leading to a conviction for an aggravated "assault" apply even more strongly where there has been an actual battery, although without the commission of a technical "assault."

Whether personal injury crimes be punished primarily on the retributive or the deterrent theory, there are at least three possible aggravating factors in punishing an act causing injury or death: (1) The amount of injury actually caused; (2) the amount of injury risked; and (3) the amount of injury intended.¹¹³ In the law of homicide, which developed early at the common law, and which has been the subject of much legislation in America, these factors are nicely taken care of. The common law of England never developed a felonious assault or battery (with the exception of mayhem, which ceased to be a felony in early times)¹¹⁴

¹⁰⁷ *People v. Vasquez and People v. Hopper*, *supra*, n. 106.

¹⁰⁸ *Com. v. Bergdoll*, 55 Pa. Super. 186 (1913).

¹⁰⁹ See (1935) 49 Harv. L. Rev. 340. As an assault is usually defined, both at common law and under codes, as an "attempted battery," the most that has been done is to permit indictment and conviction for the attempt, where the evidence showed the commission of the completed crime. This is expressly permitted in a number of states by statute. Cal. Penal Code §663; Idaho Code (1932) §17-305; Nev. Comp. L. (1929) §9975(2); N. Y. Penal Code §260; N. Dak. Comp. L. (1913) §10337; Utah R. S. (1933) §103-1-29.

¹¹⁰ This is true even in the Texas statute ex-

pressly creating an aggravated "assault" based upon the negligent driving of a motor vehicle or a motorcycle which collides with or causes injury to another. See *infra*, p. 152.

¹¹¹ *Brimhall v. State*, 31 Ariz. 522, 255 Pac. 165 (1927). See *infra*, p. 151.

¹¹² *People v. Smith*, 217 Mich. 669, 187 N. W. 304 (1922).

¹¹³ See L. Hall, *Reduction of Criminal Sentences on Appeal*, (1937) 37 Col. L. Rev. 521 at 537-38; Wechsler and Michael, *A Rationale of the Law of Homicide*, (1937) 37 Col. L. Rev. 701, 1261 at 1264-77.

¹¹⁴ *Com. v. Newell*, 7 Mass. 245 (1810).

and the common law penalty of unlimited imprisonment, at the discretion of the court, for a misdemeanor, did not require statutory intervention unless a capital punishment or transportation was desired as the penalty.

But in America, a relatively low maximum punishment for misdemeanors, and particularly for simple assault and battery, was set by the legislature in most states. Doubtless this was one step in the deflation of the judge's power which followed the Revolution. Hence, aggravated assaults were created by the legislature with more serious punishments, and some or all of these factors of aggravation were utilized as the basis of classification. To what extent may they properly be applied to injuries caused by the reckless driving of an automobile?

(a) *Aggravated Assault Based on Infliction of Serious Injury*

It is clear that such a crime requires no intent to injure for conviction. For instance, the Arizona statute provides a more serious penalty for an assault "when a serious injury is inflicted," and a reckless disregard for the safety of others is enough, if such injury is caused thereby.¹¹⁵ Likewise the Pennsylvania statute requires only that the defendant "unlawfully and maliciously inflict grievous bodily harm," and the

same recklessness which will support a conviction for assault and battery if slight harm is done, will support the three year penalty under the statute if "grievous bodily harm" has resulted.¹¹⁶ Although there is no statutory definition of an "assault of a high and aggravated nature" in South Carolina, the infliction of serious bodily harm was enough to justify a conviction before the automobile came upon the scene¹¹⁷ and in an automobile case such harm recklessly inflicted is also sufficient.¹¹⁸ A similar result is reached under the Missouri statute on felonious wounding, requiring "culpable negligence" from which the victim "be maimed, wounded, or disfigured, or receive great bodily harm or his life be endangered."¹¹⁹

(b) *Aggravated Assault Based Upon the Use of a Deadly or Dangerous Weapon.*

By similar reasoning, if there has been sufficient recklessness to constitute a battery, and the defendant has been reckless with a deadly or dangerous weapon, causing actual injury, all the elements of this type of aggravated assault are present. There was at least one decision to this effect before the automobile cases were decided.¹²⁰ Whether or not an automobile is a deadly weapon is at least a jury ques-

¹¹⁵ *Brimhall v. State*, 31 Ariz. 522, 255 Pac. 165 (1927).

¹¹⁶ The decision to this effect in *Smith v. Com.*, 100 Pa. 324 (1882), where a pistol was used, has been followed in the later automobile cases. *Com. v. Coccodralli*, 74 Pa. Super. 324 (1920); *Com. v. Donnelly*, 113 Pa. Super. 173, 172 Atl. 190 (1934); *Com. v. Kalb*, 129 Pa. Super. 241, 195 Atl. 428 (1938).

¹¹⁷ *State v. McKetterick*, 14 S. C. 346 (1880).

¹¹⁸ *State v. Sussewell*, 149 S. C. 123, 146 S. E. 697 (1929).

¹¹⁹ *Supra*, p. 138. It was applied to automobile drivers in *State v. Miller*, 234 S. W. 813 (Mo. Sup. 1921) and *State v. Sawyers*, 336 Mo. 644, 80 S. W. 2d 164 (1935). In the latter case the conviction was reversed for an error in the trial court's instruction as to degree of negligence required.

¹²⁰ *Com. v. Hawkins*, 157 Mass. 551, 32 N. E. 862 (1893). In *People v. Sullivan*, 4 N. Y. Cr. 193 (5th Dept. 1885), *supra*, p. 140, there was no actual battery committed with the deadly weapon.

tion,¹²¹ and if it is found to be such, a conviction is justified if there was an intent to inflict injury,¹²² or extreme recklessness,¹²³ or the unlawful and reckless operation of the automobile, as in *State v. Sudderth*.¹²⁴

The *Sudderth* case has been cited as a conviction for "assault with a deadly weapon with intent to kill" under N. Ca. Cons. St. 1919 §4214,¹²⁵ but the report of the case mentions only "assault with a deadly weapon," and the conviction was unquestionably for this, as §4215 provides:

"In all cases of an assault, with or without intent to kill or injure, the person convicted shall be punished by fine or imprisonment or both, at the discretion of the court: Provided, that where no deadly weapon has been used and no serious damage done, the punishment in assaults, assaults and batteries, and affrays, shall not exceed a fine of fifty dollars or imprisonment for thirty days; * * *"

It should be noted further that there may be a conviction of assault under §4215 "without intent to injure," by the express language of the statute.

Analytically, the Texas aggravated assault statute is of this type. No circumstance of aggravation is required by the statute except the use of a dangerous instrumentality, the statute now punishing:¹²⁶

"Any driver or operator of a motor

vehicle or motorcycle [who] shall wilfully or with negligence, as is defined in the Penal Code of this State in the title and chapter on negligent homicide, collide with or cause injury less than death to any other person."

In a few states the statute creating this type of aggravated assault based primarily upon the use of a deadly or dangerous weapon has also specifically required "an intent to inflict bodily harm." The ordinary interpretation of such a statute would eliminate any conviction based solely upon recklessness, and Colorado has so held.¹²⁷

But Professor Tulin has pointed out a contrary result in Illinois,¹²⁸ which he explained upon the ground that the maximum penalty for both reckless driving and simple assault and battery was a fine of \$100, whereas this aggravated assault carried a maximum fine of \$1,000 or imprisonment for 1 year or both. The court, he felt, was willing to stretch the law to convict for the aggravated assault where the penalty for simple assault and battery was no greater than that for reckless driving.¹²⁹

The Illinois statute¹³⁰ under which the prosecution was brought punished any:

"Assault with a deadly weapon, instrument, or other thing, with an intent to inflict upon the person of another bodily injury, where no considerable

to see whether or not the latter had done so.

¹²⁴ 184 N. C. 753, 114 S. E. 828 (1922).

¹²⁵ Tulin, (1928) 37 Yale L. J. 1048 at 1068.

¹²⁶ Vernon's Texas Penal Code (1936) Art. 1149 (as amended in 1939). The punishment is a fine of \$25 to \$1,000 or imprisonment from 1 month to 2 years, or both.

¹²⁷ *People v. Hopper*, 69 Colo. 124, 169 Pac. 152 (1917).

¹²⁸ *People v. Benson*, 321 Ill. 605, 152 N. E. 514 (1926).

¹²⁹ Tulin, (1928) 37 Yale L. J. 1048 at 1068.

¹³⁰ Criminal Code §25; Jones Ill. Stat. (1936) §37.039.

¹²¹ *Williamson v. State*, 92 Fla. 980, 111 So. 124, 53 A. L. R. 250 (1926); *State v. Stringer*, 140 Ore. 452, 13 P. 2d 340 (1932).

¹²² *State v. Stringer*, *supra*, n. 121. No facts are given in *Williamson v. State*, *supra*, n. 121, from which one may judge whether the conviction for assault with a dangerous weapon without intent to kill was affirmed on the basis of recklessness or on the basis of an intentional assault.

¹²³ In *People v. Goolsby*, 284 Mich. 375, 279 N. W. 867 (1938) the defendant had been stopped by a policeman. He told the policeman to get out of his way and then started driving without looking

provocation appears or where the circumstances of the assault show an abandoned and malignant heart."

Another statute provided a penalty of imprisonment from 1 to 14 years for "an assault with an intent to commit murder," including an "attempt to commit murder by any means."¹³¹ These statutes originated together as the first and second parts, respectively, of §52, c. 30, of the Illinois Revised Statutes of 1845. When the automobile cases under the first-quoted part of this section came up for decision in the Appellate Court of Illinois, there were earlier cases involving reckless use of pistols in the Supreme Court holding that the intent to murder under the second part of the section might be made out from "an act committed deliberately and likely to be attended with dangerous consequences."¹³² It was therefore an *a fortiori* case to convict of the lesser offence and to find an "intent to inflict injury" from the reckless use of an automobile.¹³³ In a later automobile case in the Supreme Court, the statute was construed as requiring a conviction if the crime would have constituted manslaughter from recklessness, had the victim died.¹³⁴

Since the publication of Professor

Tulin's article, one other state has reached a similar result. The Oklahoma statute¹³⁵ provides up to 5 years' imprisonment for:

"Every person, who, with intent to do bodily harm, and without justifiable or excusable cause, commits an assault upon the person of another with any sharp or dangerous weapon * * * although without intent to kill such person or to commit any felony."

We have already seen that in 1909, in a case of reckless shooting, the court in the Indian Territory (which was later organized as the state of Oklahoma) had affirmed a conviction for an assault with intent to kill or for an assault "with a deadly weapon with intent to inflict on the person of another a bodily injury" under the Indian Territory statutes,¹³⁶ upon proof that the defendant would have been guilty of murder or manslaughter if the victim had died.¹³⁷ This same line of reasoning was carried forward in 1929 by the Oklahoma court in *Winkler v. State*.¹³⁸ The commission of the misdemeanor of speeding was held to supply the "intent to do bodily harm" required by the present Oklahoma statute, and proof of culpable negligence made out the assault. Only manslaughter cases were cited, and the use of the words "justi-

¹³¹ Criminal Code §§23, 24; Jones Ill. Stat. (1936) §§37.037 and 37.038.

¹³² *Perry v. People*, 14 Ill. 496 (1853); *Dunaway v. People*, 110 Ill. 333 (1884). The same test has been used in recent non-automobile cases. *People v. Wilson*, 342 Ill. 358, 174 N. E. 398 (1931); *People v. Merritt*, 367 Ill. 521, 12 N. E. 2d 7 (1937).

¹³³ *People v. Clink*, 216 Ill. App. 357 (1920).

¹³⁴ *People v. Anderson*, 310 Ill. 389, 141 N. E. 727 (1923). The later decision in *People v. Benson*, 321 Ill. 605, 152 N. E. 514 (1926) which Professor Tulin relied upon, cited no cases, but evidently followed the *Anderson* case, which had been decided three years before. The *Benson* case was recently cited in *Rosenberg v. Ott*, 285 Ill. App. 50, 1 N. E. 2d 502 (1936).

¹³⁵ Okla. Comp. Stat. (1921) §1764, now 21 Okla. Stat. (1937) §652.

¹³⁶ Indian Terr. Stat. (1899) §909.

¹³⁷ *Tyner v. United States*, 2 Okla. Cr. 689, 103 Pac. 1057 (1909), *supra*, p. 144.

¹³⁸ 45 Okla. Cr. 322, 283 Pac. 591 (1929). At the time of this decision the penalty for assault and battery under Okla. Stat. (1921) §1763 was imprisonment up to 30 days or fine of \$5 to \$100 or both, and the penalty for speeding under Okla. Laws (1923) c. 16 §2 was imprisonment from 10 to 30 days or fine from \$25 to \$100 or both for the first offence, and imprisonment from 30 days to 6 months or fine from \$100 to \$1000 or both for the second offence.

fiable or excusable cause" in the assault statute, evidently referring to the statutory homicide test,¹³⁹ makes this analogy not unreasonable.¹⁴⁰

Neither the Illinois nor the Oklahoma decisions appear fully to support the thesis that the automobile convictions resulted from the fact that the reckless driving and assault and battery penalties were the same. In both states prior decisions had forecast the result before the automobile had become a factor in the situation. Once it was found that there was a battery aggravated by the use of a dangerous or deadly weapon, an automobile, the cases arguably came within the spirit, if not the letter, of the statute.

(c) *Assault with a Depraved Mind*

In Wisconsin there is a statute¹⁴¹ imposing a sentence of 1 to 8 years for assaulting another:

"In a manner evincing a depraved mind, regardless of human life, without any premeditated design to effect the death of the person assaulted, and under such circumstances that if death had resulted, the assailant would have been guilty of murder in the second degree."

The court has held that "culpable gross negligence" is not enough for conviction under this statute, although it would warrant a simple assault conviction.¹⁴² The aggravating feature is the extreme type of recklessness which would have justified a murder conviction

at the common law, and of course negligence sufficient only for manslaughter should not suffice.¹⁴³ But there is no requirement of an intent to cause injury, if injury has in fact resulted.

(d) *Assault with Intent to Inflict a Great Bodily Injury*

If the only aggravating feature is this type of intent, clearly there is no basis for holding a defendant for recklessness, and the few automobile cases in which a District Attorney has managed to secure a conviction of this type, have been reversed.¹⁴⁴ Professor Tulin comments on an Iowa case as follows: "This means that the court regarded the penalty for reckless driving (maximum fine of \$100 or imprisonment not exceeding 30 days) as sufficient."¹⁴⁵ May it not mean that no earlier Iowa precedents involving non-automobile cases which would uphold a conviction were called to the court's attention,¹⁴⁶ and that the court was unwilling to depart from its concept of "intent," whatever the consequences may have been?

(e) *Assault with Intent to Murder*

Apart from the Georgia cases, there have been few indictments for assault with intent to murder by the use of an automobile which have come before appellate courts. Most of the defendants

¹³⁹ Okla. Comp. Stat. (1921) §1752, now 21 Okla. Stat. (1937) §731.

¹⁴⁰ In *Lane v. State*, ... Okla. Cr. ..., 84 P. 2d 807 (1938), the homicide analogy was drawn upon in a case involving the accidental discharge of a gun, and a conviction of the aggravated assault was affirmed.

¹⁴¹ Wis. Stat. (1921) §4374a.

¹⁴² *Njecick v. State*, 178 Wis. 94, 189 N. W. 147 (1922).

¹⁴³ See *supra*, p. 136.

¹⁴⁴ *State v. Richardson*, 179 Iowa 770, 162 N. W. 28 (1917) *People v. Smith*, 217 Mich. 669, 187 N. W. 304 (1922).

¹⁴⁵ Tulin, (1928) 37 Yale L. J. 1048 at 1068-69.

¹⁴⁶ In *State v. Richardson*, 179 Iowa 770, 162 N. W. 28 (1917), *supra*, n. 144, the only Iowa authority which might in any way have justified the conviction was *State v. Myers*, 19 Iowa 517 (1865), and this case was probably not cited by counsel, for it was not mentioned in the decision.

have been acquitted of this offense by the jury,¹⁴⁷ but in *Shorter v. State*,¹⁴⁸ there was a conviction which was reversed on appeal. The court treated the case like a murder case, and the conviction, based solely on the commission of the misdemeanor of exceeding the speed limit, of course could not stand without proof of an intent even to injure.

But the Georgia cases present a different story. There are three cases in which reckless use of an automobile has been held to be "an assault with intent to murder by using any weapon likely to produce death" under Penal Code §97, carrying 2 to 10 years' imprisonment. It is a fact that the penalties in Georgia for reckless driving and for simple assault and battery are the same.¹⁴⁹ Both are misdemeanors, and the maximum penalty for a misdemeanor is a year with the chain gang or 6 months in jail or a fine of \$1,000, or all three.¹⁵⁰ But this would hardly seem to call for any distortion of the law in order to inflict an even more serious penalty upon a reckless driver, no matter how much damage he has caused. Indeed, this maximum penalty for simple assault and battery in Georgia is greater than that for the same crime in any other state listed in Professor Tulin's table.¹⁵¹ If it is the low penalty for reckless driving and assault and

battery which leads to a conviction for an aggravated assault, one would expect Georgia to be the last state to convict of aggravated assault, not one of the earliest, as it was in fact.

The first automobile conviction under this Georgia statute was in 1914 in *Dennard v. State*.¹⁵² The defendant, driving a car in good condition, unaccountably hit a pedestrian who was walking some distance off the travelled portion of the road. The verdict of guilty was held warranted by the evidence, the Court of Appeals saying:¹⁵³

"The presumption of malice may arise from a reckless disregard of human life; and 'there are wanton or reckless states of mind which are sometimes the equivalent of a specific intent to kill, and which may and should be treated by the jury as amounting to such intention when productive of violence likely to result in the destruction of life, though not so resulting in the given instance.' *Gallery v. State*, 92 Ga. 464, 17 S. E. 863. And see *Collier v. State*, 39 Ga. 31, 34."

The *Gallery* case, decided by the Georgia Supreme Court in 1893, had held there was no presumption of intent to murder from the use of a deadly weapon, if death did not result, but had added the words quoted above, which were the basis of this decision twenty years later.¹⁵⁴ The *Collier* case, decided in 1869, had gone much further, and was not overruled until 1929.¹⁵⁵

¹⁴⁷ *Williamson v. State*, 92 Fla. 980, 111 So. 124, 53 A. L. R. 250 (1926); *State v. Sussewell*, 149 S. C. 128, 146 S. E. 697 (1929); *Davis v. Com.*, 150 Va. 611, 143 S. E. 641 (1928). But *Duhon v. State*, 136 Tex. Crim. 404, 125 S. W. 2d 550 (1939), was a conviction which was affirmed on appeal. The state's evidence was that the defendant had intentionally run over the victim when she had refused to accede to his immoral demands, and from such conduct it was proper for the jury to find the specific intent to kill required by the statute.

¹⁴⁸ 147 Tenn. 355, 247 S. W. 985 (1923).

¹⁴⁹ Georgia Code (1933) §26-1408 makes battery a misdemeanor, and §§68-301, 68-307 and 68-9908 make driving at an excessive speed and driving while intoxicated punishable as misdemeanors.

¹⁵⁰ Georgia Penal Code §1065, Code (1933) §27-2506.

¹⁵¹ Tulin, (1928) 37 Yale L. J. 1048 at 1064-65.

¹⁵² 14 Ga. App. 485, 81 S. E. 378 (1914).

¹⁵³ 14 Ga. App. 488.

¹⁵⁴ *Supra*, p. 143.

¹⁵⁵ See *supra*, n. 57.

There were no other Georgia decisions on this point until 1927, when three cases were decided in the same division of the Court of Appeals and by the same three judges, within two weeks of each other, which took both sides of the question. In *Chambliss v. State*¹⁵⁶ the court, in an opinion by Luke, J., followed the *Dennard* case, and affirmed an aggravated assault conviction based upon reckless and unlawful driving. On the same day Broyles, J., wrote the opinion of the same court in *Andrews v. State*,¹⁵⁷ in which the defendant had operated a car with a smoke screen device which emitted deadly carbon monoxide and had caused a pursuing officer to run into the bank of the road. The court reversed the conviction upon the ground that there was no proof that the defendant knew of the poisonous gas he was emitting, whereas "the specific intent to kill is a necessary ingredient of the offense." Twelve days later Broyles, J., wrote another opinion in *Springer v. State*¹⁵⁸ in which the court categorically held that an *intentional* assault and battery was needed for conviction of the aggravated assault, and reversed a conviction based on reckless driving.

Then came two cases in which it was

clear that the defendants had intentionally run down their victims in automobiles,¹⁵⁹ but no more convictions for a reckless "assault with intent to murder" were affirmed in Georgia for seven years. Broyles, J., carried his colleagues with him in following the *Springer* case in the next three decisions.¹⁶⁰ But when the other two judges resigned, the new majority of the court in 1934 overruled these cases, going back to the language of the Supreme Court in the *Gallery* case in 1893, to uphold a conviction for a reckless assault with intent to kill, leaving Broyles, J., to dissent.¹⁶¹ The most recent case is to the same effect, although a higher degree of recklessness is required for the aggravated assault than the criminal negligence which is all that is needed for simple assault and battery.¹⁶² The problem is one which should be brought to the attention of the Supreme Court of Georgia.

The drafting of an indictment for a Georgia aggravated assault by reckless use of an automobile has given rise to some problems. As we have seen, Penal Code §97 punishes "an assault with intent to murder by using any weapon likely to produce death." It has been held that no words in the indictment which do not charge an "intent to mur-

¹⁵⁶ 37 Ga. App. 124, 139 S. E. 80 (July 14, 1927).

¹⁵⁷ 37 Ga. App. 95, 138 S. E. 923 (July 14, 1927).

¹⁵⁸ 37 Ga. App. 154, 139 S. E. 159 (July 26, 1927).

¹⁵⁹ *Goldin v. State*, 38 Ga. App. 110, 142 S. E. 757 (1928); *Sudan v. State*, 41 Ga. App. 828, 155 S. E. 102 (1930).

¹⁶⁰ *Smith v. State*, 39 Ga. App. 552, 147 S. E. 781 (1929); *Neese v. State*, 40 Ga. App. 503, 150 S. E. 451 (1929); *Gresham v. State*, 46 Ga. App. 54, 166 S. E. 443 (1933).

¹⁶¹ *Easley v. State*, 49 Ga. App. 275, 175 S. E. 23 (1934).

¹⁶² *Mundy v. State*, 59 Ga. App. 509, 1 S. E. 2d 605 (1939). This case is further remarkable in that it held extreme intoxication rendering the defendant unable to manage his car would justify a conviction of assault with intent to murder, contrary to the general rule that intoxication may be a defence if it is so complete as to negate the specific intent required. *People v. Gilday*, 351 Ill. 11, 183 N. E. 573 (1932). But of course once the major premise of the Georgia decisions is adopted, that no intent to murder need be proved, the intoxication unquestionably does provide cogent evidence of its substitute, recklessness.

der" will suffice.¹⁶³ But the requirement of the use of a "weapon likely to produce death" has been virtually eliminated. Anything which a man can use with intent to kill, will suffice for conviction, and no allegations characterizing the means used are needed in the indictment.¹⁶⁴

Conclusion

We have found most of the automobile assault and battery cases following the historical development of battery in this country which started in 1858 with the *Sloanaker* case, by which, as in manslaughter, there may be liability for injury recklessly caused. This development of battery was virtually completed before the first automobile case was decided in 1912. Nor does the relation between the penalties for assault and battery and for reckless driving appear to have been at all material in the automobile cases, except in guiding the prosecuting attorney's discretion in selecting the crime for which to try the defendant.

There are a few exceptions. Liability for *assault* has been imposed for reckless conduct causing injury, although ordinarily an assault (as distinguished from a battery) requires an intent to injure, or at least to alarm. But these cases involve no more than interpreting the term "assault" in a statute or indictment to include also a battery, or else finding in a reckless battery what-

ever intent is needed for such an assault. Such interpretation is clearly reasonable, to correct a legislative misnomer, or to support a verdict for a lesser crime than that actually proved, and the policy behind it is clear. Statutory provisions drafted 75 years ago to codify the common law as it then existed should grow with the common law. If the definition of "assault" in the aggravated assault statutes were intended to be limited to the assault without a touching which requires an intent to inflict injury, statutes penalizing an "assault with a deadly weapon *with intent to do harm*," as is true in Colorado, Illinois and Oklahoma, would not have been drafted with such a tautological form of expression.¹⁶⁵

There is a simple solution for this problem which ought to be adopted in every state—the enactment of a statute providing:

"In any criminal case, the word 'assault' in any indictment, information, warrant, complaint, or other pleading shall be deemed to include and charge also a battery. Proof that a defendant has committed a battery shall be sufficient to sustain a conviction for assault in any crime in which criminal liability is predicated, in whole or in part, upon an assault."

This suggested statute, as far as pleading is concerned, should be added to §188 of the American Law Institute's Code of Criminal Procedure.

The second exception is found where a reckless battery has been held to war-

a conviction for the aggravated assault was affirmed where the indictment charged the infliction of injury with a reckless disregard of human life "which reckless disregard was the equivalent of an intent to kill and murder."

¹⁶³ Wright v. State, 168 Ga. 690, 148 S. E. 731 (1929), an indictment charging the infliction of serious wounds by the operation of an automobile "with a reckless disregard for human life" was held insufficient, and in *Minge v. State*, 45 Ga. App. 197, 164 S. E. 68 (1932), an allegation that an assault was committed "with malice aforethought" was also held insufficient. But in *Easley v. State*, 49 Ga. App. 275, 175 S. E. 23 (1934),

¹⁶⁵ See *supra*, p. 152.

rant a conviction for an aggravated assault and battery which, by statute, expressly required an intent to inflict harm or to murder. This rests upon the cases from Illinois, Oklahoma and Georgia, and an ambiguous intimation in Tennessee.¹⁶⁶ In each of the first three states the automobile cases merely follow earlier decisions involving other means of inflicting injury. In Georgia at least, inadequacy of the penalty for the reckless driver could not be the reason for his liability for the aggravated assault—18 months and \$1,000 fine would seem to be enough for him under any rational view. Opposed to these cases are decisions denying liability under somewhat similar statutes in Colorado, Iowa and Texas.

The early non-automobile cases upon which the modern Illinois, Oklahoma and Georgia decisions rest may well represent an attempt to find a suitable penalty for a reckless battery aggravated by the infliction of serious injury or the creation of a great risk through the use of a deadly weapon, where the only aggravated assault which the legislature had created required an intent to harm or murder. As Professor Tulin has asked, "The function [of penalties] should be openly expressed."¹⁶⁷ But

from a review of all these cases, it appears that penalties have played a much smaller part in the development of modern judge-made law than Professor Tulin's article seemed to indicate.

Of course, where the meaning of a statute is in doubt, courts should and do consider whether the penalty sheds any light on the probable intention of the legislature. This is a particularly fruitful source of light where the question at issue is whether the requirement of a fraudulent intent is to be read into a statute.¹⁶⁸ But it would seem better on the whole, in the case of aggravated assault, if there had been no convictions based on reckless driving under statutes requiring a specific intent to injure or kill, even if the alternative was a penalty for a simple assault which the court felt to be inadequate. In Texas and New York, where the courts declined to let recklessness play the role of intent in assault and battery, corrective legislation was rapidly forthcoming to deal with the reckless driver of an automobile.¹⁶⁹ With legislatures as active as they are today, and in a better position than most courts to judge of the desires of their citizens, judicial restraint seems wiser than ever.

¹⁶⁶ *Shorter v. State*, 147 Tenn. 355, 247 S. W. 985 (1923).

¹⁶⁷ Tulin, (1928) 37 Yale L. J. 1048 at 1069.

¹⁶⁸ The penalty was the determining factor in the search for what "the Legislature must have intended" in *People v. Clark*, 242 N. Y. 313, 151 N. E. 631 (1926). As to the importance of the penalty in the allied problem of mistake of fact, see Perkins, *Ignorance and Mistake in Criminal Law*, (1939) 88 U. Pa. L. Rev. 35, 59, and Sayre, *Public Welfare Offenses*, (1933) 33 Col. L. Rev. 55, 83.

¹⁶⁹ The Texas statute was passed in 1917, with a maximum penalty of 2 years' imprisonment and \$1,000 fine, for aggravated assault by automobile. See *supra*, p. 141. The New York statute was passed in 1921, making the "culpably negli-

gent" operation of a vehicle "whereby another suffers bodily injury" into an assault in the third degree, carrying punishment up to one year and fine up to \$500, or both. See *supra*, p. 141. The legislatures of Colorado and Iowa have not raised their maximum penalties for simple assault and battery since the decisions referred to. The Colorado penalty for assault and battery was already about adequate for a reckless driver—6 months' imprisonment or \$100 fine. *Courtright Stat.* (1913) §1659. The Iowa legislature has permitted cumulation of assault and reckless driving penalties in its latest statute, which will permit a maximum sentence of 60 days' imprisonment and \$200 fine for a battery by reckless driving. *Laws 1937*, c. 134, §§311, 314, 315; *Code* (1935) §12929.